

ATTACHMENT 3



Administrator's Decision on High Cost Program Beneficiary Appeal

Via Email and Certified Mail

October 29, 2013

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Re: Appeal of the Independent Auditor's Report on Aventure Communication Technology, L.L.C.'s Compliance with High Cost Support Mechanism Rules (USAC Audit No. HC2011BE011)

Dear Mr. Canis:

The Universal Service Administrative Company (USAC) has reviewed the appeal you filed on behalf of Aventure Communication Technology, L.L.C. (Aventure), dated February 18, 2013, concerning USAC's decision to recover [REDACTED]¹ in federal Universal Service High Cost Program support disbursed for the 2007 through 2011 program years. The amount to be recovered was determined by an audit of Aventure conducted by USAC's Internal Audit Division (IAD).² Aventure appealed USAC's determination that Aventure's Free Conference Service Carrier (FCSC) lines reported on the FCC Forms 525 for the period audited were ineligible for federal Universal Service High Cost Program support.³

Decision on Appeal: Denied. USAC has determined that [REDACTED] of previously disbursed High Cost Program support should be recovered.

Background and Discussion

Aventure appealed USAC's determination that Aventure's FCSC lines reported on the FCC Forms 525 during the timeframe audited do not meet the criteria required pursuant

¹ This recovery represents amount disbursed in 2007 through 2012. The 2012 amount relates to frozen high cost support that was based on 2011 line count data.

² See *Independent Auditor's Report on Aventure Communication Technology, L.L.C.'s Compliance with High Cost Support Mechanism Rules* (USAC Audit No. HC2011BE011) (May 15, 2012) (*Aventure Audit Report*).

³ Letter from Jonathan E. Canis, Arent Fox LLP, Counsel to Aventure, Communication Technology LLC, to Universal Service Administrative Company, High Cost and Low Income Division (Feb. 18, 2013), at 1 (*Aventure Appeal Letter*).

to 47 C.F.R. Part 36, Subpart G and 47 C.F.R. § 54.101, and therefore, are ineligible to receive High Cost Program support.⁴ In the appeal letter, Aventure asserts:

1. All of the admissions are contained within the IAD report prove Aventure's case that its FCSC lines are eligible for High Cost Program support;
2. USAC misread and misapplied the regulations at 47 C.F.R. § 54.101;
3. USAC's determination that the services offered by Aventure are special access service is incorrect;
4. USAC's determination that Aventure's calls do not terminate and that Aventure has no end users in its designated service area contravenes FCC rulings;
5. USAC's determination that Aventure's lines reported are not revenue producing lines also contravenes FCC decisions and industry practice;
6. Aventure was an eligible telecommunications carrier for all periods audited; and
7. USAC's conclusions are novel and cannot be applied retroactively.⁵

I. Aventure Asserts That USAC's Audit Report and Aventure's Documentation Provided During the Audit Fully Support That Its FCSC Lines Are Eligible for High Cost Program Support⁶

Aventure first argues that the Federal Communications Commission's (FCC's or the Commission's) *Connect America Fund Order*⁷ and supporting documentation that was provided by Aventure during the audit supports finding that Aventure "provides terminating access service and all of its reported lines are 'revenue producing.'"⁸ However, as previously discussed in USAC's management response in the *Aventure Audit Report*, the *Connect America Fund Order* "is effective prospectively and covers disbursements for 2012 and thereafter. Therefore, the *Order* is not applicable to the scope of this audit. However, even if the *Order* had been applicable during the audit period, the Beneficiary would still not have been eligible to receive High Cost Program support for its FCSC customers. While the *Order* did revise the supported services, carriers are still required to provide access to emergency services [pursuant to the *Order*]. The Beneficiary did not provide its FCSC customers with access to emergency services, and therefore, these lines are not eligible for High Cost Program support under both the Rules in effect during the audit period and the [revised] Rules in effect under the *Order*."⁹

⁴ See *Aventure Audit Report*, at 71.

⁵ See *Aventure Appeal Letter*, at 1-2.

⁶ *Id.*

⁷ In the *Matter of Connect America Fund, A Nat'l Broadband Plan for Our Future, Establishing Just and Reasonable Rates for local Exchange Carriers, High Cost Universal Service Support, Developing and Unified Intercarrier Compensation Regime, Fed.-State Joint Bd. on Universal Service, Lifeline and Link Up, Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 07-135, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Rep. & Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663 (2011) (*Connect America Fund Order*).

⁸ See *Aventure Appeal Letter*, at 2-3.

⁹ *Aventure Audit Report*, at 66.

Additionally, Aventure asserts that it has provided documentation to USAC that demonstrates it provided terminating access service and that all of its reported lines are thus revenue producing.¹⁰ IAD concluded after reviewing the documentation provided by Aventure that it did not contain sufficient detail to be in compliance with § 54.202(e).¹¹ As such, the documentation that was provided by Aventure "did not demonstrate sufficient, appropriate evidence that the FCSC customers were billed for these lines and the Beneficiary did not provide any other documentation to demonstrate that it assessed or collected any fees related to [the FCSC] lines, including the end user common line charge required for MLB lines per the Form 525 Instructions."¹² "Without sufficient, appropriate evidence to conclude otherwise, it appears these [FCSC] lines are not revenue producing working loops and may not be reported as such for High Cost Program purposes."¹³

Aventure further argues that USAC "concedes that voice grade lines carried over high capacity circuits are eligible for High Cost Support."¹⁴ In addition, Aventure argues that USAC acknowledged in the audit report that "Aventure's conference bridges are located in its end office facility in Salix, Iowa," which is located in Aventure's designated service area and that "[a]ll calls were terminated at the FCSC's respective DS3 equipment located in Salix, Iowa."¹⁵ Aventure concludes that the reported FCSC lines are thus, eligible for USF support.¹⁶

While the conference bridge equipment may reside at Aventure's central office in Salix, Iowa, Aventure's actual end-users were not located in the Beneficiary's designated service areas.¹⁷ Pursuant to 47 C.F.R. § 54.201(b),¹⁸ it is the responsibility of state commissions to designate a carrier's service area for the purposes of receiving universal service support. As the customers claimed by the Aventure for High Cost Program support were located outside of its service area designated by the Iowa Utilities Board

¹⁰ *Aventure Appeal Letter*, at 2-3.

¹¹ See *Aventure Audit Report*, at 64-68 (describing the documentation that was provided by Aventure and explaining why each type of documentation was insufficient or not relevant to the issues raised during the audit). See also 47 CFR § 54.202(e) ("All eligible telecommunications carriers shall retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules. These records should include the following: data supporting line count filings; historical customer records; fixed asset property accounting records; general ledgers; invoice copies for the purchase and maintenance of equipment; maintenance contracts for the upgrade or equipment; and any other relevant documentation. This documentation must be maintained for at least five years from the receipt of funding.").

¹² See FCC Form 525 Instructions, OMB Control No. 3060-096, at 2.

¹³ *Aventure Audit Report*, at 67.

¹⁴ *Aventure Appeal Letter*, at 3.

¹⁵ *Id.*

¹⁶ See *id.* (concluding that Aventure properly documented its line counts and termination points for the lines reported in accordance with the FCC rules).

¹⁷ See *Aventure Audit Report*, at 63 (discussing the issue that Aventure's conference operator customers were located outside of Aventure's designated service area).

¹⁸ 47 CFR § 54.201(b) ("A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission.").

(IUB), these lines were not eligible to receive High Cost Program support.¹⁹ In addition, USAC further found that although the calls may have terminated at the conference bridge equipment located in Salix, Iowa, none of the end-users using the bridge conference equipment were located in Adventure's designated service area and thus, these lines were not eligible for High Cost program support.²⁰ During the audit, the auditors also found that Adventure did not use the FCSC customers' billing addresses for the reported lines because these customers were located outside of Adventure's designated service area in Iowa.²¹

USAC does not concur with Adventure's assertion that the information provided in the audit report and Adventure's documentation support finding that its FCSC lines were eligible for High Cost Program support. In addition, USAC will further explain below as to why it determined that the FCSC lines reported and claimed by Adventure in 2007 through 2011 were not eligible for High Cost Program support.

II. Adventure Failed to Provide All the Designated Services Set Forth at 47 C.F.R. § 54.101 for Its FCSC Lines Thereby Rendering These Lines Ineligible for High Cost Program Support

As explained previously in USAC's management response, "The Beneficiary does not meet the criteria required by 47 C.F.R. § 54.101, and therefore, is ineligible to receive High Cost Program support for their FCSC lines. Adventure's FCSC service does not qualify as single party service because it fails to meet the definition set forth in Subpart G that requires an end user line must be a direct connection from a central office switch to the end user's premises. The facility provided by Adventure is a DS3 circuit with no direct connection to any specific end user. The service can be deemed neither single nor multi-party without a direct connection to any end user customer."²² Therefore, Adventure's FCSC service lacks the required functionality that eligible telecommunication carriers (ETCs) must provide to their customers to receive High Cost Program support.

Adventure states that its switch contains technology to provide the services required by the Rules and that having a switch that is capable of providing all of the designated services at 47 C.F.R. § 54.101(a) satisfies the FCC rules for receiving universal service support.²³ While Adventure asserts its switch has the capability to provide the required services pursuant to 47 C.F.R. 54.101(a), the failure to actually provision these services to its FCSC customers means the carrier is not satisfying the "designated services" requirement and is not entitled to receive universal service.²⁴

¹⁹ *Adventure Audit Report*, at 62.

²⁰ *See id.*

²¹ *See id.* at 63.

²² *Adventure Audit Report*, at 71.

²³ *See Adventure Audit Report*, at 3 (explaining that Adventure's switch is capable of providing all the designated services so Adventure is providing "access to" these services); *see also Adventure Appeal Letter*, at 4 (reiterating that its switch is able to provide all required services and that Adventure is required to only offer the required services instead of actually providing all of the required services).

²⁴ *See Adventure Audit Report*, at 71.

In its appeal, Adventure specifically argues that it is required only to offer the necessary services, but that it does not have to actually "provide all the enumerated services."²⁵ Adventure explains that USAC "conflate[d] the terms 'offering' and 'providing.' Section 54.101(b) states that 'An eligible telecommunications carrier must offer voice telephone service as set forth in paragraph (a) of this section to receive federal universal support. But IAD reads this provision as requiring an ETC to provide all enumerated services.'"²⁶ USAC disagrees with Adventure's assertion that eligible telecommunications carriers are not required to provide all enumerated services pursuant to 47 C.F.R. § 54.101(a) to receive High Cost Program support. In the 1997 *Universal Service Order*, the Commission adopted the Joint Board's recommendation and required that "eligible carriers must provide each of the designated services in order to receive universal service support."²⁷ In this Order, the FCC also granted eligible carriers a reasonable time period to "complete network upgrades required for them to begin offering certain services that they are currently incapable of providing."²⁸ Adventure has not proffered any reason as to why its FCSC customers were not provided with single-party service, access to emergency services, access to operator services and access to directory assistance.²⁹ Indeed, Adventure affirms in its appeal letter that "Adventure does not provide these services to its conference operator customers because they cannot use such services."³⁰ As a result, because Adventure does not provide all of the designated services as required by 47 C.F.R. § 54.101 for its FCSC lines, these lines are not eligible to receive universal service support.

III. Adventure's FCSC Lines are Special Access Dedicated Circuits and Are Not Eligible for High Cost Support

Adventure's appeal further asserts the FCSC DS3 facilities are not special access service but are switched-access service eligible for High Cost Program support.³¹ Adventure bases this contention on its understanding that these lines are switched access because they are conveying communications from a tandem switch over a high capacity DS3 circuit to a conference call company, thereby making these lines eligible to receive High Cost Program support.³²

²⁵ *Adventure Appeal Letter*, at 4.

²⁶ *Id.*

²⁷ *In the Matter of Fed.-State Joint Bd. on Universal Service*, CC Docket No. 96-45, Report & Order, FCC 97-157, 12 FCC Rcd 3776, ¶ 89 (1997) (*1997 Universal Service Order*).

²⁸ *See id.* at ¶¶ 89-91 (allowing carriers time to build out their networks to provide single-party service and access to E911 service only if "exceptional circumstances" warranted the granting of universal service support during the build out period). Adventure has provided no support for its argument that it only needed to merely offer all designated services in order to receive universal service support.

²⁹ *See Adventure Audit Report*, at 8. Instead, Adventure argues that its switch is able to provide these services and thus, Adventure is able to "provide access" to these services. Adventure also asserts that every support line is not required to provide all of the designated services, although it offers no support for this statement. *See Adventure Audit Report*, at 14.

³⁰ *Adventure Appeal Letter*, at 5.

³¹ *Id.* at 7.

³² *Id.* at 8. *See also Adventure Audit Report*, at 72.

Aventure's assertion that its FCSC DD3 service is "switched service" conflicts with the requirements of Parts 36 and 54 of the FCC's rules. 47 C.F.R. § 54.307(b)³³ and §36.611(h)³⁴ require ILECs to only report the number of working Exchange Line C&WF loops (or Category 1 loops) to receive High Cost Program support. These Category 1 Loops are defined by 47 C.F.R. § 36.152(a)(1)³⁵ as a discrete end user facilities between local central offices and subscriber premises. Therefore, USAC cannot accept Aventure's reporting of 672 voice grade channels associated with its FCSC DS3 service because 47 C.F.R. Part 36, Subpart G³⁶ would classify the FCSC DS3 service as a wideband service. 47 C.F.R. §§ 54.307³⁷ and 36.152³⁸ specifically exclude wideband circuits from receiving High Cost Program support. Therefore, the FCSC DS3 service does not meet the definition of a Category 1 C&WF, and is correctly classified as Category 2 C&WF (wideband), which is not eligible for High Cost Program support.³⁹

In addition, Aventure cites the FCC's 2007 decision from *Qwest v. Farmers and Merchants*⁴⁰ as support that its FCSC service qualifies for High Cost Program support.⁴¹

³³ 47 CFR § 54.307(b) ("In order to receive support pursuant to this subpart, a competitive eligible telecommunications carrier must report to the Administrator the number of working loops it serves in a service area pursuant to the schedule set forth in paragraph (c) of this section. For a competitive eligible telecommunications carrier serving loops in the service area of a rural incumbent local exchange carrier, as that term is defined in § 54.5, the carrier must report, by customer class, the number of working loops it serves in the service area, disaggregated by cost zone if disaggregation zones have been established within the service area pursuant to § 54.315. For a competitive eligible telecommunications carrier serving loops in the service area of a non-rural telephone company, the carrier must report the number of working loops it serves in the service area, by customer class if the non-rural telephone company receives Interstate Common Line Support pursuant to § 54.901 and by disaggregation zone if disaggregation zones have been established within the service area pursuant to § 54.315 of this subpart, and the number of working loops it serves in each wire center in the service area. For universal service support purposes, working loops are defined as the number of working Exchange Line C&WF loops used jointly for exchange and message telecommunications service, including C&WF subscriber lines associated with pay telephones in C&WF Category 1, but excluding WATS closed end access and TWX service. Competitive eligible telecommunications carriers providing mobile wireless service in an incumbent LEC's service area shall use the customer's billing address for purposes of identifying the service location of a mobile wireless customer in a service area.").

³⁴ 47 CFR § 36.611(h) ("For rural telephone companies, as that term is defined in § 51.5 of this chapter, the number of working loops for each study area. For non-rural telephone companies, the number of working loops for each study area and for each wire center. For universal service support purposes, working loops are defined as the number of working Exchange Line C&WF loops used jointly for exchange and message telecommunications service, including C&WF subscriber lines associated with pay telephones in C&WF Category 1, but excluding WATS closed end access and TWX service. These figures shall be calculated as of December 31st of the calendar year preceding each July 31st filing.").

³⁵ 47 CFR § 36.152(a)(1) ("Exchange Line C&WF *Excluding Wideband*—Category 1—This category includes C&W facilities between local central offices and subscriber premises used for message telephone, private line, local channels, and for circuits between control terminals and radio stations providing very high frequency maritime service or urban or highway mobile service.").

³⁶ 47 CFR § 36 Subpart G ("Wideband Channel—A communications channel of a bandwidth equivalent to twelve or more voice grade channels.").

³⁷ See *supra* n.35.

³⁸ See *supra* n.37.

³⁹ *Aventure Audit Report*, at 73.

⁴⁰ *In the Matter of Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co.*, File No. EB-07-MD-001, Mem. Op. and Order, FCC 07-175, 22 FCC Red 17973, 17985-88, ¶¶ 30-38 (2007)

Specifically, Aventure asserts that the FCC found that Farmers and Merchants could collect access charges for terminating calls to conference operators.⁴² Aventure further explains that although the FCC reconsidered its initial decision,⁴³ the FCC never reversed its decision as to whether switched access charges may be collected from conference operators' calls.⁴⁴ However, the FCC in fact found that Farmers and Merchants was not entitled to charge switched access rates for calls from conference operators. In the 2009 *Qwest Reconsideration Order*, the FCC reversed its earlier decision and found that Farmers and Merchants were not entitled to charge switched access charges for calls made by conference operators because the conference operators were not "end users" who were purchasing services through Farmers and Merchants' tariff.⁴⁵ The Commission explained that the services Farmers and Merchants were providing to the conference operators were not the services that were offered through Farmers and Merchants' tariff.⁴⁶ The Commission stated that "because the conference calling companies did not subscribe to services offered under Farmer's filed tariff, they were not 'customers' or 'end users.' In turn, the service Farmers provided to Qwest for calls of the conference calling companies was not 'switched access service' as defined in the tariff."⁴⁷ Thus, Qwest was not required to pay Farmers and Merchants' charges for terminating the conference calling companies' calls and the FCC directed Qwest to file a complaint for damages.⁴⁸

In its appeal, Aventure also cites to an older line of FCC cases where the Commission found that AT&T failed to meet its burden to show that the rural LECs violated FCC rules by entering into revenue sharing agreements with conference call operators.⁴⁹ Aventure concludes that because the FCC found that AT&T did not meet its burden to show these carriers violated FCC rules, the FCC also concluded the carriers were entitled to collect switched access charges for conference operators' calls.⁵⁰ However, this specific issue was not discussed in the orders cited by Aventure. In addition, the FCC

(finding that Farmers and Merchants did not violate Commission rules when it imposed terminating access charges for calls from conference operators because the Commission found that the conference operators were purchasing services through the company's tariff).

⁴¹ *Aventure Appeal Letter*, at 8.

⁴² *See id.*

⁴³ *In the Matter of Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co.*, File No. EB-07-MD-001, Second Order on Reconsideration, FCC 09-103, 24 FCC Rcd 14801 (2009) (2009 *Qwest Reconsideration Order*) (reversing its original order and finding conference calling companies were not end users under Farmers and Merchants' tariff and that Farmers and Merchants was not entitled to charge the Qwest tariffed switch access rates).

⁴⁴ *See Aventure Appeal Letter*, at 8.

⁴⁵ 2009 *Qwest Reconsideration Order*, 24 FCC Rcd at 14813, ¶ 26.

⁴⁶ *See id.* at 14810, ¶ 22.

⁴⁷ *Id.*

⁴⁸ *Id.* at 14801, ¶ 1 ("Qwest may file a supplemental complaint for damages within sixty days of the release of this order.").

⁴⁹ *See Aventure Appeal Letter*, at 8 (citing to *In the Matter of AT&T Corp. v. Jefferson Telephone Co.*, File No. E-97-07, Mem. Op. and Order, FCC 01-243, 16 FCC Rcd 16130 (2001), *In the Matter of AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc., et al.*, File No. E-96-36, Mem. Op. and Order, 17 FCC Rcd 4041 (2002); *In the Matter of AT&T Corp. v. Beehive Telephone Co. et al.*, File No. E-97-04, Mem. Op. and Order, FCC 02-186, 17 FCC Rcd 11641 (2002)).

⁵⁰ *See Aventure Appeal Letter*, at 8.

issued a series of recent orders in 2011 and 2013 holding that the carriers were not entitled to switched access charges for conference operators' calls because the carriers were not providing the conference operator customers tariffed services.⁵¹ As USAC will discuss further below, Adventure was not providing its FCSC customers with tariffed services. Thus, Adventure's FCSC customers were not "end users" under Adventure's tariff and Adventure was not entitled to charge access charges for the conference operators' calls.

IV. Adventure's FCSC Customers were not "End Users" and Did Not Subscribe to Adventure's Tariffed Services

Adventure disputes the Iowa Utilities Board's (IUB's) 2009 decision that FCSC service does not have any "end users."⁵² Adventure asserts that the FCC found that conference call operators are end users and that the calls "terminate" at the location of the conference call bridge equipment.⁵³ Further, Adventure believes the IUB's findings in the 2009 decision violate FCC's precedent and cannot be relied upon for this audit.⁵⁴

In 2009, the IUB issued an order regarding Adventure and the services provided to its FCSC customers.⁵⁵ Specifically, the IUB found that the "FCSCs are not end users of the Respondents [including Adventure] for purposes of their intrastate tariffs. The FCSCs did not subscribe to the Respondent's access or local service tariffs and the FCSC did not expect to pay for and did not pay for any of the Respondents' local exchange service offerings."⁵⁶ In addition, the IUB also found that the Respondents' calls did not terminate at end users' premises.⁵⁷ The IUB found that the FCSCs' conference bridge equipment was located at the Respondents' premises and that the premises were under the control of the Respondents and not the end users.⁵⁸ Thus, the IUB concluded that the FCSC lines terminated at the Respondents' premises and not the premises of the end users.⁵⁹ The IUB further found that certain FCSC calls were delivered to a router at

⁵¹ See, e.g., *In the Matter of Qwest Communications Co. v. Northern Valley Communications*, File No. EB-11-MD-001, Mem. Op. and Order, FCC 11-87, 26 FCC Rcd 8332, 8338, ¶ 11 (2011) (finding that CLECs may not impose switched access charges pursuant to a tariff unless it is offering the tariffed services to its end users); *In the Matter of Qwest Communications Co. v. Sancom, Inc.*, File No. EB-10-MD-004, Mem. Op. and Order, FCC 13-321, 28 FCC Rcd 1982, 1994, ¶ 28 (2013) ("We find that the Free Calling Companies were not 'end users' under Sancom's Tariff and, therefore, that Sancom was not entitled to charge Qwest for switched access under the Tariff. By charging Qwest nonetheless, Sancom violated sections 201(b) and 203(c) of the Act."); *In the Matter of AT&T Corp. v. All American Telephone Co., et al.*, File No. EB-09-MD-010, Mem. Op. and Order, FCC 13-38, 28 FCC Rcd 3477, 3494-95, ¶ 38 (2013) (*All American Order*) (holding that the carriers did not terminate calls to 'end users' within the meaning of their tariffs and thus, they could not properly bill for access services under the terms of their tariffs.).

⁵² *Id.* at 12.

⁵³ See *Adventure Appeal Letter*, at 12 (citing to the FCC's first *Qwest Order* that was subsequently reversed).

⁵⁴ *Id.*

⁵⁵ See *In the Matter of Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket No. FCU-07-2, Final Order (Iowa Utilities Board 2009) (2009 IUB Order).

⁵⁶ *Id.* at 34.

⁵⁷ See *id.* at 39.

⁵⁸ See *id.*

⁵⁹ See *id.*

Aventure's central office and then forwarded to its ultimate destination.⁶⁰ The IUB concluded that "the called party was not the FCSC, it is a person or business located somewhere other than the Respondents' exchanges. Therefore these calls are not subject to intrastate terminating switching access charges in Iowa."⁶¹ The IUB concluded that "none of the FSCS associated with the Respondents were end users for purposes of the Respondents' intrastate exchange access tariffs, none of the intrastate toll traffic associated with the FCSCs terminated at an end user's premises, and much of the intrastate toll traffic associated with the FCSCs did not terminate in the Respondents' certificated local exchange area. For each of these reasons, intrastate access charges did not apply to calls to the FCSCs and should not have been billed to the IXC's for calls to numbers assigned to the FCSCs."⁶²

USAC concurs with the findings made by the IUB in 2009 regarding Aventure because during the audit Aventure was unable to provide documentation to show that: (1) the FCSC customers were end users and were subscribing to services from Aventure's tariff;⁶³ and (2) that the FCSC customers were located in Aventure's designated service area.⁶⁴ Specifically, Aventure has not provided documentation to show that the FSCS companies were in fact subscribing to Aventure's tariffed services.⁶⁵ USAC does not agree that the documentation provided by Aventure during the audit demonstrates that Aventure assessed and billed its FCSC customers any fees related to these FCSC lines including the end user common line charges required for MLB lines per the FCC Form 555 instructions.⁶⁶ In addition, USAC further notes that the IUB also determined during its investigation that Aventure did not assess any fees to its FCSC customers and that Aventure, like Farmer and Merchants above, entered into untariffed agreements with its FCSC customers.⁶⁷ Aventure has not provided USAC with sufficient documentation to demonstrate that it provided FCSC customers with tariffed services and that Aventure

⁶⁰ See *id.* at 42.

⁶¹ *Id.*

⁶² *Id.* at 53-54.

⁶³ See *Aventure Audit Report*, at 9-10, 63-66, 75-76.

⁶⁴ See *id.* at 9, 61-63, 74-75.

⁶⁵ See *id.* at 9-10.

⁶⁶ See *id.* at 64.

⁶⁷ See *2009 IUB Order*, at 26-27 (addressing Aventure's claims that it invoiced its FCSC customer \$5 per a line, per month fee, and agreeing with Qwest's evidence that the invoices were never issued to the FCSC customers and were instead issued to an intermediary broker). The IUB concluded that although it "is not clear when Aventure sent the invoices for this untariffed rate, [that] they were not legitimate bills for which Aventure expected to be paid." *Id.* In addition, the IUB concluded that "the FCSCs did not subscribe to the services in the Respondents' access and local exchange tariffs and therefore were not end users of the Respondents The Board finds the lack of timely, legitimate billing for tariffed services by the respondents demonstrates that the FCSCs did not actually subscribe to a billable tariffed service. Moreover, there is convincing evidence that the Respondents did not intend to bill the FCSCs for any services under their tariffs, as required in order for intrastate access charges to apply. Specifically, the Respondents did not comply with the billing requirements of their tariffs when they did not send the FCSCs monthly local exchanges invoices, they did not bill the FCSCs the EUCL on any invoices, they did not bill the FCSCs a federal USF charge on any invoices, and they did not bill the FSCS for ISDN Line Ports, ISDN BRI arrangements, or ISDN PRI arrangements on any invoices." *Id.* at 24-25. Aventure's billing documentation given to USAC provides that Aventure billed its FCSC customer \$5 per line, but there is no indication on the invoice that any of the requested fees were assessed. *Aventure Audit Report*, at 44.

billed the FCSC customers monthly access fees and services.⁶⁸ Thus, USAC determined that the FCSC customers were not end users and that the FCSC lines were not eligible for High Cost Program support.⁶⁹ In addition, the documentation provided by Adventure showed that its FCSC customers were not located in its designated service area and that the calls terminated outside of Adventure's service area.⁷⁰

Adventure argues that USAC may not rely on the findings by IUB or the IUB's September 2009 order.⁷¹ However, as discussed above, USAC concurs with the IUB's findings. In addition, USAC further notes that the Commission rejected a similar argument by a rural ILEC who alleged the findings from the Utah Public Service Commission should not be relied upon by the Commission. The Commission responded with "[w]e disagree with Defendants' contention that the Utah PSC's findings are irrelevant to our analysis. The Utah PSC conducted extensive proceedings into All American's operations, and its findings are credible and independently supported by the record."⁷²

Adventure further contends the IAD report improperly dismisses the FCC's *Connect America Fund Order* as controlling precedent.⁷³ Adventure asserts that the *Connect America Fund Order* confirms that calls to conference operators and chat lines should be deemed regulated, switched access services.⁷⁴ USAC disagrees that the *Connect America Fund Order* supports Adventure's assertion that its FCSC lines are eligible switched access services. As explained above, USAC determined that Adventure provided special access services that are not eligible for High Cost Program support.⁷⁵ In addition, USAC also determined that Adventure's FCSC customers were not end users.⁷⁶ Further, the *Connect America Fund Order's* revised rules regarding simulated call traffic were not in effect during the time period audited and cannot be applied retroactively.⁷⁷ For these reasons, USAC finds that Adventure's reliance on the *Connect America Fund Order* does not render its FCSC lines eligible for High Cost Program support.

V. Adventure's FCSC Lines Were Not "Revenue-Producing" And Were Not Eligible for High Cost Program Support

Adventure asserts that the FCSC lines reported should be considered revenue producing because: (1) Adventure's relationships with its conference operator customers is a form of "access sharing;" (2) Adventure has billed for interstate switched access charges and is pursuing collection actions against the long distance carriers to recover them; and (3)

⁶⁸ See *Adventure Audit Report*, at 9-10, 67, 75.

⁶⁹ See *Id.*

⁷⁰ See *Adventure Audit Report*, at 9, 62-64, 74.

⁷¹ See *Adventure Appeal Letter*, at 12.

⁷² *All American Order*, 28 FCC Rcd at 3495, ¶ 39.

⁷³ *Adventure Appeal Letter*, at 13.

⁷⁴ *Id.* at 14.

⁷⁵ See *supra* at Section III.

⁷⁶ See *supra* at Section IV.

⁷⁷ See *Adventure Audit Report*, at 75.

NECA has stated in their presentations that a carrier does not have to bill or collect any amount in order to report a "revenue producing loop."⁷⁸

Aventure's reference to access sharing based on verbiage from the FCC's *Connect America Fund Order* is unavailing. First, as previously discussed, the determinations of that Order are only effective prospectively and were not in place for the period in question.⁷⁹ Second, Aventure's arrangements with its conference operator customers in revenue sharing agreements which convey the benefit of FCSC's traffic resultant terminating access stimulation do not supplant the requirement to charge its FCSC customers for the tariffed DS3 service.

IAD determined that Aventure did not provide adequate billing documentation to support that any payments were made by any of its FCSC customers in compliance with the requirements of 47 C.F.R. § 54.202(e).⁸⁰ Aventure did not provide reasonable evidence that it assessed or collected any fees related to these lines, including the end user common line charge required for MLB lines per the Form 525 instructions. Without sufficient evidence to conclude otherwise, the auditors were not able to find that these lines were revenue producing working loops. As such, the FCSC lines could not be reported as such for High Cost Program support purposes.⁸¹

USAC further notes that Aventure's arguments for collecting service access charges are aimed at the long distance IXCs. Aventure has not provided any evidence that it has also billed its FCSC customers and is pursuing collection actions against its FCSC customers for non-payment of services.⁸²

USAC also finds that the cited NECA's presentations are unpersuasive and do not modify the audit findings. Although, NECA may include a broad definition for "revenue producing" in its presentation, the fact remains that Aventure did not provide all the designated services set forth at 47 C.F.R. § 54.101 to its FCSC customers. As explained above, the FCSC lines do not meet the criteria required by 47 C.F.R. § 54.101 and therefore the lines reported are ineligible to receive High Cost Program support.⁸³

VI. USAC's Audit Findings Are Not Novel and Are Not Being Applied Retroactively Towards Aventure's Audited FCSC Lines

⁷⁸ See *Aventure Appeal Letter*, at 15.

⁷⁹ See *Aventure Audit Report*, at 75.

⁸⁰ 47 C.F.R. § 54.202(e) ("All eligible telecommunications carriers shall retain all records required to demonstrate to auditors that the support received was consistent with the universal service high-cost program rules. These records should include the following: data supporting line count filings; historical customer records; fixed asset property accounting records; general ledgers; invoice copies for the purchase and maintenance of equipment; maintenance contracts for the upgrade or equipment; and any other relevant documentation. This documentation must be maintained for at least five years from the receipt of funding.").

⁸¹ *Aventure Audit Report*, at 9.

⁸² See *Aventure Audit Report*, at 18-10. See also *Aventure Appeal Letter*, at 15.

⁸³ See *supra* at Section II.

Aventure asserts that the Aventure Audit Report includes novel findings that are not supported by FCC rules or orders and that USAC is retroactively applying new rules towards Aventure's audited line counts.⁸⁴ Specifically, Aventure argues that there is no precedent to conclude that voice grade services terminated over a high-capacity circuit do not qualify for High Cost Program support.⁸⁵ Aventure also asserts that USAC has never made a determination on whether High Cost Program support can be provided for calls provided to conference call operators.⁸⁶ Thus, Aventure argues that USAC issued novel findings and is retroactively applying new rules to the audited FCSC lines.

USAC does not concur that it has issued novel findings or is retroactively applying new rules towards Aventure's audited FCSC lines. As explained above, even though Aventure's high-capacity circuit may be used to provide all the enumerated voice services pursuant to 47 C.F.R. § 54.101, Aventure concedes that it is not providing all the required voice services to its FCSC customers.⁸⁷ The issue has never been whether Aventure's high-capacity circuit is able to provide all the required voice services, but rather Aventure is not providing all required voice services to its FCSC customers.⁸⁸ Aventure is not eligible to receive federal universal service High Cost Program support if it is not providing all of the required voice services set forth at 47 C.F.R. § 54.101.⁸⁹ Further, the Commission's 1997 *Universal Service Order* set forth this precedent and it is not a new rule that is being applied retroactively to Aventure's audited FCSC lines.⁹⁰

USAC is not required to address the general question of whether any calls to conference operators may be eligible for federal universal High Cost Program support. USAC determined through the audit of Aventure's FCSC lines that these specific FCSC lines are not eligible for High Cost Program support for the reasons discussed above.

VII. Conclusion

USAC has reviewed and considered the documentation and arguments proffered by Aventure in regards to the Aventure Audit Report's findings. USAC is not persuaded to reverse the auditor's findings for the following reasons. First, Aventure failed to provide all the required services at 47 C.F.R. § 54.101 to its FCSC customers.⁹¹ To receive High Cost Program support, ETCs are required to provide all of the required services.⁹² Second, Aventure's services to FCSC customers were ineligible special access services

⁸⁴ See *Aventure Appeal Letter*, at 19.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *Aventure Appeal Letter*, at 5 ("Aventure does not provide [emergency calling, operator, or directory assistance] services to its conference operator customers because they cannot use such services.").

⁸⁸ See *supra* at Section II.

⁸⁹ See *id.*

⁹⁰ See 1997 *Universal Service Order*, 12 FCC Rcd 8776, ¶ 89 ("Consistent with the Joint Board's recommendation, we conclude that eligible carriers must provide each of the designated services in order to receive universal service support.").

⁹¹ See *supra* at section II..

⁹² See 1997 *Universal Service Order*, 12 FCC Rcd at ¶ 89.

and not eligible switched access services.⁹³ Third, Aventure's FCSC customers were not end users and the FCSC customers were not located in Aventure's designated service area.⁹⁴ Finally, because Aventure did not invoice or bill access charges to its FCSC customers, USAC determined that the FCSC lines were not working loops eligible for federal universal support.⁹⁵ Therefore, as discussed above, Aventure's appeal is hereby denied.

Aventure Appeal Rights

If you wish to further appeal this decision, you may file an appeal pursuant to the requirements of 47 C.F.R. Part 54, Subpart I. Detailed instructions for filing appeals are available at:

<http://www.usac.org/hc/about/program-integrity/appeals.aspx>

//s// Universal Service Administrative Company

⁹³ See *supra* at Section III.

⁹⁴ See *supra* at Section IV.

⁹⁵ See *supra* at Section V.

ATTACHMENT 4

**CONFIDENTIAL
PROPRIETARY**

December 24, 2013

VIA E-MAIL

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Re: **LETTER REQUESTING BOARD REVIEW: Administrator's Decision on High Cost Program Beneficiary Appeal; (USAC Audit No. HC2011BE011)**

To the High Cost and Low Income Committee of the Board of Directors:

This Request for Review is submitted by Aventure Communication Technology, L.L.C. ("Aventure"), by its undersigned counsel, in response to the Administrator's Decision on High Cost Program Beneficiary Appeal, dated October 29, 2013 ("*Administrator's Decision*"), and pursuant to the rules of the Universal Service Administrative Company (USAC) and Sections 54.719-54.725 of the rules of the Federal Communications Commission (FCC), 47 C.F.R. §§ 54.719-54.725.

This letter asks the High Cost and Low Income Committee of the ~~USAC~~ Board of Directors ("the Committee"), or if the Committee deems it appropriate, the full USAC Board of Directors, to review the *Administrator's Decision*. The *Administrator's Decision* denies Aventure's appeal seeking reversal of conclusions of the Internal Audit Division (IAD) made in an Independent Auditor's Report dated May 15, 2012 ("*IAD Report*"). A copy of the *Administrator's Decision* is appended to this letter at Attachment 1.

As discussed below, the *Administrator's Decision*, and the underlying *IAD Report* are characterized by a fundamental misreading of the Commission's rules and policies. As Aventure has demonstrated, the *Administrator's Decision* and *IAD Report* are not supported by precedent, and constitute novel statements of policy and interpretation of the Commission's rules. As such, they are *ultra vires* and merit reversal.

AFDOCS/10620007.1

I. REVIEW BY THE COMMITTEE OR THE BOARD IS APPROPRIATE

Aventure has chosen to seek review by the High Cost and Low Income Committee of the Board of Directors, rather than an immediate appeal to the FCC's Wireline Competition Bureau because the findings of the IAD are so fundamentally flawed that even a cursory review by the experts on the Committee should be able to verify the legitimacy of Aventure's challenges.

The FCC has recognized that review by a Committee or the full Board can be an efficient means of seeking redress while minimizing the burden on FCC Staff:

We also agree with USAC . . . that affected parties should be encouraged to bring issues to the attention of the division head or the USAC CEO to determine whether the matter can be handled without a formal appeal to the Commission. We anticipate that, under certain circumstances, a party may prefer to seek redress initially from the appropriate Committee of the Board or the full USAC Board. Accordingly, we conclude that affected parties should have the option of seeking redress from a Committee of the Board or, if the matter concerns a billing, collection, or disbursement matter that falls outside of the jurisdiction of a particular committee, from the full USAC Board. We encourage parties to seek redress in the first instance from Committees of the Board for matters that involve straightforward application of the Commission's rules. To the extent that affected parties can obtain prompt resolution of such disputes, support mechanism participants will be better served and limited Commission resources will be conserved.¹

Aventure believes that this request for review falls squarely within the jurisdiction of the High Cost and Low Income Committee, which among other things, is tasked with "making decisions concerning: . . . (iii) Administration of the application process, including activities to ensure compliance with Federal Communications Commission rules and regulations; [and] (iv) Performance of audits of beneficiaries under the high cost, low income, interstate access universal service and interstate common line support mechanisms"²

II. BACKGROUND AND OVERVIEW

This letter asks the Committee to reverse the conclusions set forth in the *IAD Report*, which consists of an Independent Auditor Report, issued by USAC and the Internal Audit

¹ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 25058, 25092 ¶ 67 (1998). Submitting this request for Committee review tolls the time period for filing an appeal with the Commission. *Id.* at 25093 ¶ 70.

² 47 U.S.C. § 54.705(c)(1).
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Division, dated May 15, 2012, and the USAC Management Response appended to that same document at pages 71-82. Because of the size of that document, Adventure will not append it to this letter, but rather refers to the *IAD Report* by reference.

In November 2011, IAD initiated an audit of Adventure. On May 8, 2012, IAD provided Adventure with a draft Detail Exception Worksheet (DEW) and conducted an Exit Conference with representatives of Adventure and their counsel. On May 15, 2012, Adventure, through counsel, submitted its Opposition to Internal Audit Division Draft Detail Exception Worksheet ("*DEW Opposition*"). That *Opposition* is appended to this letter at Attachment 2 (because its attachments are voluminous, Adventure does not append them, but will provide copies upon request). The *DEW Opposition* made the following points:

- The DEW conclusions are not supported by any precedent, and fail to comport with long-established industry practices. *DEW Opposition* at 2-4, 12-13.
- The DEW conclusions that Adventure's lines are not "working loops" and are special access lines are wrong as a matter of law and fact. *DEW Opposition* at 4-6.
- The DEW conclusions that the calls to Adventure's conference operators do not "terminate" in Adventure's service territory, and do not terminate to "end users" are unsupported and ignore relevant precedent. *DEW Opposition* at 7-9.
- The DEW relies on an order by the Iowa Utilities Board that is based on state law, and is inconsistent with FCC rules. *DEW Opposition* at 10-12.
- The DEW refuses to consider factors that mitigate the damages it asserts. Imposing a retroactive refund obligation on Adventure would cause irreparable harm. *DEW Opposition* at 13-14.

Also on May 15, 2012, the IAD issued its *IAD Report*. The *Report* concludes that Adventure incorrectly reported lines associated with calls to conference operators on the Adventure network as USF-eligible lines. The *Report* bases this conclusion on five findings:

1. The Adventure lines do not carry supported services.
2. The Adventure lines are not "revenue producing."
3. The Adventure lines are dedicated, high capacity Special Access circuits.
4. No calls terminated to locations within the Adventure service area, because the conference bridge locations cannot be defined as "end user" premises.
5. Adventure's designation as an Eligible Telecommunications Carrier ("ETC") is in doubt.

May 15, 2012 was also the day Adventure initiated a Freedom of Information Act (FOIA) request to USAC, asking that USAC produce any USAC or FCC decisions that it used as precedent to support any of the conclusions of the *IAD Report*. This initiated a series of correspondence between USAC and Adventure's counsel, clarifying the FOIA Request and reaching agreement on the amounts that Adventure would pay to cover the cost of USAC's research into the issue. The final letter in that stream of correspondence reflects the final agreement between Adventure and USAC. That letter is dated September 19, 2012, and is appended to this letter at Attachment 3. To date, USAC has not produced any of the materials requested in the FOIA request, or otherwise responded to it.

On December 18, 2012, the USAC High Cost and Low Income Division sent a letter to Adventure, asserting a claim for [REDACTED] for virtually all high cost funds received by Adventure between 2007 and 2011. On February 18, 2013, Adventure filed with USAC a *Letter of Appeal*, asking the High Cost and Low Income Division to reverse the findings of the *IAD Report*. A copy of the *Letter of Appeal* is appended at Attachment 4. The *Administrator's Decision* denied the Adventure appeal, and affirmed the conclusions of the *IAD Report* without modification. In doing so, it provided no new precedent or arguments, but simply reiterated the conclusions of the *IAD Report*.

As Adventure demonstrated in its *DEW Opposition* and *Letter of Appeal*, and further demonstrates in this letter, the *IAD Report* and *Administrator's Decision* are premised on a fundamental misunderstanding of the FCC's rules and policies and reach conclusions that are demonstrably inconsistent with the FCC's rules and orders. Moreover, they largely ignore the showings made by Adventure.

Also, as will be discussed in detail below, USAC has failed for over a year to respond to the Adventure FOIA request, which was expressly designed to identify any precedent that supported the *IAD Report's* conclusions. USAC's failure – or inability – to provide the most basic support for its conclusions demonstrates that the *IAD Report* is not, and cannot be, supported by precedent, and is *ultra vires* the enumerated powers designated to USAC by the FCC.

III. THE IAD REPORT AND ADMINISTRATOR'S DECISION ARE ULTRA VIRES THE AUTHORITY GRANTED USAC BY THE FCC

Section 54.702(c) of the FCC's rules restricts USAC to applying established FCC precedent, and prohibits USAC from making new policy or interpreting unclear policies:

The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.³

In the discussions of specific decisions in the *IAD Report* and the *Administrator's Decision* below, Aventure will identify numerous instances in which USAC has made new policy decisions, and made decisions in areas where the law clearly has not been settled by the Commission. In these instances, the *IAD Report* and the *Administrator's Decision* are *ultra vires* USAC's delegated authority, and must be reversed.

IV. THE IAD REPORT AND ADMINISTRATOR'S DECISION DISREGARD THE FCC'S STATEMENT OF THE LAW, AND INSTEAD RELY ON A RULING BY THE IOWA UTILITIES BOARD THAT IS DEMONSTRABLY INAPPOSITE

The bulk of the findings in the *IAD Report* and the *Administrator's Decision* are taken from an order issued by the Iowa Utilities Board (IUB).⁴ Specifically, they take the *IUB Order* as controlling precedent for the findings that: Calls to Aventure's conference bridge did not "terminate" within Aventure's service area (*Administrator's Decision* at 3, 8); Aventure's conference customers were not "end users" (*id.* at 4, 8-10); that failure to receive payment from the conference operators disqualifies the service as access service (*id.* at 8-9); that Aventure entered into non-tariffed agreements with its conference operators, and that this somehow affects the eligibility of its lines as switched access (*id.* at 9); that Aventure did not provide the IUB with sufficient documentation to show that it billed its conference customers for end user common line charges or other charges (*id.* at 9-10). The *Administrator's Decision* repeatedly states that it "concurs" with the *IUB Order*. *Id.* at 9-10.

Aventure has shown that the *IUB Order* was limited to an analysis of Aventure's intrastate tariff, using Iowa state law; that the *IUB Order* was expressly rejected as precedent by the FCC in the *Connect America Order*; that the *IUB Order* is otherwise inconsistent with FCC

³ 47 C.F.R. § 54.702(c).

⁴ *Iowa Utilities Board, Qwest Comms. Corp. v. Superior Tel. Coop. et al.*, Docket No. FCU-07-2, Final Order (issued September 21, 2009) ("IUB Order").
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rulings; and that the *IUB Order* has been superseded by subsequent proceedings at the IUB. *DEW Opposition* at 10-12; *Letter of Appeal* at 12-13, Attachment 1.

The *Administrator's Decision* does not address these arguments, other than to say that inconsistencies between the *IUB Order* and the *Connect America Order* will not be taken into account because the *Connect America Order's* new rules had prospective effect. Adventure has demonstrated that the *IUB Order* is fundamentally inconsistent with established FCC precedent from 2000 to the present, and cannot be used as controlling, or even indicative authority by USAC.

V. **THE SPECIFIC FINDINGS OF THE IAD REPORT AND THE ADMINISTRATOR'S DECISION ARE NOT SUPPORTED BY EVIDENCE OR PRECEDENT AND ARE UNSUSTAINABLE**

A. **The Finding That Adventure's Calls Do Not Terminate Within Its Service Area Ape An Argument That Has Been Expressly Rejected By The FCC**

The *IAD Report* and the *Administrator's Decision* hold that calls to Adventure's conference customers do not "terminate" in Adventure's service area. *IAD Report* at 62-63; *Administrator's Decision* at 3-4. Their argument is that the location of the "customer" is not the conference bridge, but either the locations of the users of the conference bridge, or the headquarters of the conferencing company. As Adventure has demonstrated in its *DEW Opposition* (at 6-7) and *Letter of Appeal* (at 10-12), this finding has been expressly rejected by the FCC. In its *Connect America Order*, the FCC addressed and rejected the same argument made by Qwest:

Qwest argues that calls to the conference calling companies are ultimately connected to -- and terminate with -- users in disparate locations. According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number. Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point. We find Farmers' characterization of the conference calling services to be more persuasive than Qwest's.

Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the termination points are actually call initiation points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times -- B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.⁵

The *Connect America Order* both confirms that calls to conference operators are switched access services, and disposes of the IAD's findings regarding the locus of the terminating calls.

B. The Finding That Adventure's Conference Operators Are Not "End Users" Is Wrong As A Matter Of Law And Is Ultra Vires

The *IAD Report* and *Administrator's Decision* hold that Adventure's conference operators cannot be defined as "end users" and so the switched access calls to them do not "terminate," and so the calls do not constitute "supported services." *IAD Report* at 62-63; *Administrator's Decision* at 7-8. In so finding, they cite the *IUB Order*, which as discussed above, cannot be used as precedent by USAC because it is inconsistent with established FCC precedent. The *Administrator's Decision* also relies on several recent decisions issued by the FCC over the past four years: Decisions in formal complaints in *Qwest v. Farmers and Merchants*, *Qwest v. Northern Valley*, *Qwest v. Sancom* and *AT&T v. All American*. *Administrator's Decision* at 6-8. The Administrator attempts to take the rulings from these four party-specific adjudications and create a per se rule of law that conference and chat operators cannot be end users.

The *Connect America Order* expressly refused to establish a per se rule against sending traffic to high volume conference and chat operators:

⁵ *Connect America Fund*, 26 FCC Rcd 17663, 17985-86, ¶¶ 32-33 (footnotes omitted) (emphasis in original).

As proposed in the USF/ICC Transformation NPRM, we do not declare revenue sharing to be a per se violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.⁶

Moreover, each of the fact-specific and party-specific formal complaint rulings cited in the *Administrator's Decision* emphasizes that the rulings are limited to the facts of that specific case. In each case, the FCC conducted an analysis of the language of specific tariffs and the conduct of the individual carrier, and confined its decision to the party-specific facts of the case. E.g.: "Accordingly, based upon the totality of the circumstances and facts of this case, we conclude that the conference calling companies do not constitute 'end users' within the meaning of the tariff provisions at issue."⁷ "As discussed above, based on our interpretation of Sancom's filed Tariff, and Sancom's relationship with the Free Calling Companies, we find that Sancom's interstate access charges are unlawful because Sancom was not providing service under the Tariff."⁸

No review of the language of the Aventure tariff, in the context of its relationship with its conference operator customers has been undertaken by USAC or the FCC. The establishment of a per se rule of law by USAC, based on these clearly inapposite FCC decisions, is impermissible and *ultra vires*, and must be reversed.⁹

C. The Conclusion That Access Stimulation Service Is Special Access Is Wrong As A Matter Of Law, And Demonstrates A Lack Of Understanding Of Basic Network Design

The *IAD Report* and *Administrator's Decision* find that the services at issue are wideband Special Access services, which are not eligible for USF support. *IAD Report* at 7, 61; *Administrator's Decision* at 5-8. This finding reflects a profound lack of understanding of basic telephone network design, and directly conflicts with multiple FCC decisions, and as such must be reversed.

⁶ *Id.*, 26 FCC Red at 17879 ¶ 672.

⁷ *Qwest Comms. Corp. v. Farmers and Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Red 14801, 14813, ¶ 25 (2009).

⁸ *Qwest Comms. Co. v. Sancom Inc.*, 28 FCC Red 1982, 1993 ¶ 25 (2013).

⁹ This is particularly the case because Aventure has provided cites to several cases in which the FCC expressly found that calls to conference and chat operators were subject to access charges. The *Administrator's Decision* has no reply, other than to dismiss these cases because "this specific issue was not discussed" in those cases. *Administrator's Decision* at 7 & n. 49.

Aventure informed IAD that it used interoffice DS3 trunks to transfer the voice grade calls from the tandem switch to the Aventure end office where the conference bridges were located. This is, of course, standard industry practice, given the volumes of calls delivered to the bridges. Aventure explained at length that the conference bridges were analogous to Centrex switches and remote switches used to carry voice traffic, and were fully consistent with USAC's filing instructions and the NECA Loop Count Guide (*DEW Opposition* at 4-6; *Letter of Appeal* at 10), but these arguments were completely ignored in the *IAD Report* and *Administrator's Decision*.

Moreover, Aventure briefed three FCC decisions that found that local exchange carriers that delivered very high volumes of voice traffic to chat and conference operators were providing switched access service, subject to tariffed switched access rates. *Letter of Appeal* at 9-10. The *Administrator's Decision* ignores this precedent, saying only that those cases because "this specific issue was not discussed" in them. *Administrator's Decision* at 7 & n.49.

IAD and the Administrator ignore evidence to the contrary, in favor of their interpretation of service definitions. Yet, they provide no precedent showing that such determinations have been made by USAC or the FCC in the past (as confirmed by their inability to respond to Aventure's FOIA request). These findings by the *IAD Report* and *Administrator's Decision* are novel and unprecedented – and so are *ultra vires*. They are also nonsensical – the majority of voice traffic is transported to end offices over high capacity links, without changing the traffic's character as switched access service. These conclusions of the *IAD Report* and *Administrator's Decision* must be reversed.

D. The Finding That Aventure's Lines Are Not "Revenue Producing" Is Wrong As A Matter Of Law, And Is Ultra Vires

The *IAD Report* and *Administrator's Decision* find that the circuits used to deliver voice calls to conference bridges located in Aventure's end office are not "revenue producing" and so do not qualify for High Cost support. *IAD Report* at 62-63, 76; *Administrator's Decision* at 10-11. IAD and the Administrator base this conclusion on a finding that Aventure has not yet collected fees from its conference operator customers, and on their assertion that Aventure is unable to collect access fees from its interexchange carrier customers.

Aventure has demonstrated in detail that several FCC decisions from 2000 and 2001, and the *Connect America Order* of 2011, hold that calls to chat and conference operators constitute switched access service, billable at tariffed access rates, regardless of whether the chat/conference operator pays a fee to the local exchange carrier. Aventure also demonstrated that the treatment of such calls as supportable switched access service is supported by NECA

materials and industry practice. *DEW Opposition* at 8-9; *Letter of Appeal* at 16-17 and Attachment 1, slide 11.

E. The IAD's Stated "Lack Of Confidence" That Adventure Billed Its Customers Ignores Record Evidence And Sets An Unprecedented Standard Of Review

As stated in the *DEW Opposition*, the *IAD Report* and *Administrator's Decision* ignore massive amounts of documentation showing that Adventure billed all of its conference operator customers for services, including the end user common line charge. *DEW Opposition* at 7-8. This shortcoming was never cured. Rather, the *IAD Report* simply states that IAD "does not have reasonable confidence that [Adventure] assessed . . . any fees related to these lines." *Id.*, citing DEW at 5. This appears to be a legal conclusion – IAD does not even attempt to show that the actual bills and customer lists provided by Adventure were inaccurate. In any event, the *IAD Report's* assertion of a lack of "reasonable confidence" is unexplained, and no standard of review for reaching this conclusion is stated. As such, the finding is unsupported and must be reversed.

F. The Conclusion That USF Recipients Must Actually Provide Every Supported Service To Every Customer Is Unprecedented And Impractical

The *IAD Report* and *Administrator's Decision* establish a new per se rule – no service is eligible for High Cost USF support unless the carrier actually provides each and every supported service to the customer. *Administrator's Decision* at 4-5 & nn. 22, 24, citing *IAD Report* at 71. Adventure made the point that IAD was conflating the "offering" of the supported services with the "provision" of those services, and demonstrated that the Commission's rules required only that the supported services be offered. *DEW Opposition* at 2-4; *Letter of Appeal* at 3-5.

As Adventure stated in those pleadings, Adventure is a full-service carrier that provides long distance and local voice calling to residential and business customers, as well as access termination service to conference operators. As such it operates a full-function Class 4-5 Taqua switch that is capable of providing all supported services listed in 47 C.F.R. § 54.101. But its access termination circuits to conference operators are one-way, inbound circuits – the conference operators have no need of outbound emergency calling or other outbound services, and choose not to pay for such services. But under the new rule adopted in the *IAD Report* and *Administrator's Decision*, no inbound-only circuit can ever qualify for USF. Indeed, under IAD's new ruling, a carrier cannot receive USF support unless it provides (as opposed to offer) toll blocking (one of the enumerated supported services) to every customer.

This has never been the position of the FCC, and USAC has produced no precedent to support such a ruling. Because this is either an unprecedented new ruling, or the clarification of

unclear rules, USAC may not make such findings without guidance from the FCC, and its rulings are *ultra vires*. Moreover, as Aventure has demonstrated, the IAD/Administrator conclusions are patently inconsistent with NECA instructions and standard industry practice.

G. The IAD Report and Administrator's Decision Ignore Or Summarily Dismiss Evidence Demonstrating The Veracity Of Aventure's Arguments

In supporting the conclusion that calls to conference operators on Aventure's network are switched access calls, fully eligible for High Cost support, Aventure cites to the FCC's *Connect America Order*.¹⁰ That order adopted new rules governing "access stimulation" – i.e. the provision of voice access service to high-volume conference operators, which is a significant amount of the Aventure service at issue in this case. The *Connect America Order* confirmed that access stimulation services are – and always have been – access services, subject to the same tariff and "benchmark rate" regulatory structure that the FCC established in 2001:

We maintain the benchmarking approach to the regulation of the rates of competitive LECs. . . . There is insufficient evidence in the record that abandoning the benchmarking approach for competitive LEC tariffs Instead, we believe it is more appropriate to retain the benchmarking rule but revise it to ensure that the competitive LEC benchmarks to the price cap LEC with the lowest rate in the state, a rate which is likely most consistent with the volume of traffic of an access stimulating LEC.¹¹

As this *Connect America Order* language makes clear, this recent FCC statement of the law is diametrically opposed to the IUB decision that IAD accepts as controlling authority. *DEW Opposition* at 9; *Letter of Appeal* at 13-16, 18. The *IAD Report and Administrator's Decision* simply dismiss this argument by stating that the *Connect America Order's* new rules had prospective effect, and so did not apply during the audit period. *Administrator's Decision* at 2. But as Aventure has shown, only the new rates prescribed in the *Connect America Order* have prospective effect – the language quoted above on its face confirms that calls to conference operators have at all times been classified as switched access service.

Similarly, Aventure has cited numerous FCC decisions that ruled in favor of the collection of access charges for calls to conference and chat operators. *Letter of Appeal* at 15-16. Indeed, the FCC has even prescribed switched access rates for calls terminating to a chat/conference operator.

¹⁰ *Connect America Fund*, 26 FCC Rcd 17663 (2011).

¹¹ *Id.* at 17887-88 ¶ 694 (emphasis added).